

Claimant appeared by his attorney, Jeff C. Spahn, Jr. of Wichita, Kansas. The respondent and insurance carrier appeared by their attorney, Douglas D. Johnson of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Randall C. Henry of Hutchinson, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for an eighty-four percent (84%) work disability. Also, the Administrative Law Judge ordered the insurance carrier to arrange an independent medical examination at either of two designated orthopedic clinics and stated that future medical treatment would only be considered after receipt of the opinion from one of those clinics. The respondent and insurance carrier requested this review and raised the following issues:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.
- (2) Nature and extent of claimant's disability, if any.
- (3) Whether claimant is entitled to future medical care and treatment.

Those are the issues now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The computation of the Award of the Administrative Law Judge should be modified. Although the Appeals Board finds claimant is entitled to permanent partial disability benefits based upon a forty percent (40%) work disability rather than the eighty-four percent (84%) found by the Administrative Law Judge, the weekly permanent partial disability rate does not change nor does the total amount of the Award because claimant's average weekly wage is \$1,360.19 and he still qualifies for the maximum weekly benefit.

- (1) The Appeals Board agrees claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on July 25, 1991, when he was thrown in the air and landed on his back on top of a metal gantry while attempting to install a cobalt machine at Wesley Hospital in Wichita. After that incident, claimant's symptomatology would wax and wane but overall progressively worsened until he was required to undergo a second lumbar fusion. The Appeals Board finds it is more probably true than not that the claimant's July 1991 accident caused a hairline fracture in one of the pedicle screws placed in claimant's back during his first lumbar fusion in March 1991 and that the accident also aggravated claimant's lumbar spine. After the July 1991 accident, claimant's physicians discovered the March 1991 surgery did not result in a successful fusion.

(2) The Appeals Board agrees with the findings and conclusions of the Administrative Law Judge pertaining to all matters at issue in this proceeding except the finding of loss of access to the open labor market. The Administrative Law Judge found claimant had an eighty-seven percent (87%) loss of access to the open labor market based upon the testimony of labor market expert Patricia Onion. The Appeals Board finds Ms. Onion's testimony regarding loss of access to the open labor market unpersuasive because it was not based upon the restrictions and limitations provided by a physician but, instead, based upon claimant's understanding of his restrictions which was inaccurate. In formulating her opinion of loss of access to the open labor market, Ms. Onion utilized information she had obtained from claimant and, therefore, believed that claimant was restricted to lifting eight to ten (8-10) pounds, and to sitting one-half ($\frac{1}{2}$) hour, to standing one-quarter ($\frac{1}{4}$) hour. In addition, Ms. Onion considered that claimant's concentration was affected making it difficult for him to read. However, we find claimant's actual restrictions to be, as provided by board-certified physiatrist Francisco Torres-Ramos, M.D., to wit: (1) no lifting greater than fifteen to twenty (15-20) pounds; (2) avoid frequent bending and stooping; (3) avoid standing more than fifteen (15) minutes; (4) avoid prolonged sitting or standing; and (5) avoid medium and heavy physical activity.

The Appeals Board finds the difference between claimant's actual restrictions and the information he provided to Ms. Onion to be significant and problematic when attempting to determine the loss of access to the open labor market because we are dealing with the loss of occupations and each occupation requires specific abilities. Because of the inaccuracy of the restrictions, the Appeals Board is unable to accept Ms. Onion's opinion regarding loss of ability to perform work in the open labor market and, therefore, finds that the claimant has failed to prove a loss for that prong of the test of work disability as contained in K.S.A. 1991 Supp. 44-510e. Therefore, the Appeals Board finds the prong of the work disability test regarding loss of ability to perform work in the open labor market is zero percent (0%).

The Appeals Board adopts the finding of the Administrative Law Judge regarding claimant's loss of ability to earn a comparable wage. The Appeals Board finds Ms. Onion's opinion that claimant has lost eighty percent (80%) of his ability to earn a comparable wage as a result of this injury to be credible despite Ms. Onion's assumptions regarding claimant's permanent work limitations.

Because he has sustained a "nonscheduled injury," claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1991 Supp. 44-510e. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this instance there is no compelling reason to give either factor a greater weight. Therefore, the Appeals Board averages both losses and finds claimant has

sustained a forty percent (40%) permanent partial general disability for which claimant is entitled to receive benefits.

(3) The claimant is entitled future medical care and treatment upon proper application to the Director. The Appeals Board adopts the findings and order of the Administrative Law Judge directing the respondent and insurance carrier to provide an independent medical examination with either the Mayo Clinic Orthopaedic Department in Jacksonville, Florida, or the Rogozinski Orthopaedic Clinic in Jacksonville, Florida, before the Judge will consider future medical treatment options.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl entered in this proceeding on May 11, 1995, should be, and hereby is, modified; that claimant is entitled permanent partial disability benefits based upon a forty percent (40%) work disability.

The claimant is entitled to 76.28 weeks of temporary total disability compensation at the rate of \$289.00 per week followed by permanent partial disability compensation at \$289.00 per week not to exceed \$100,000.00 for a 40% permanent partial general body disability.

As of October 5, 1995, there would be due and owing to the claimant 76.28 weeks of temporary total compensation at \$289.00 per week in the sum of \$22,044.92, plus 142.72 weeks of permanent partial compensation at \$289.00 per week in the sum of \$41,246.08 for a total due and owing of \$63,291.00 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$36,709.00 shall be paid at \$289.00 per week until fully paid or until further order of the Director.

The finding and order of the Administrative Law Judge for an independent medical examination is also adopted by the Appeals Board as if fully set forth herein as are all other orders of the Judge that are not inconsistent with the findings and orders made herein.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff C. Spahn, Jr., Wichita, KS
Douglas D. Johnson, Wichita, KS
Randall C. Henry, Hutchinson, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director